No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, et al.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CALIFORNIA, DELAWARE, HAWAI'I, INDIANA, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. The petitioner States and the United States (together, the "government") allege that respondent American Express Company ("Amex") violated § 1 through anti-steering rules, which prohibit merchants from encouraging Amex cardholders to use different, lower-fee credit cards. Applying the rule of reason, the district court held that the government had proven a prima facie violation by establishing that the anti-steering rules imposed anticompetitive effects (such as a price increase) on merchants. On appeal, the Second Circuit reversed, holding that to prove a prima facie violation the government had to show not only anticompetitive effects on the merchant side but also insufficient procompetitive benefits on the cardholder side. The question presented is:

> Under the rule of reason, did the district court's finding that Amex's anti-steering provisions stifled price competition on the merchant side of Amex's credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the anti-steering rules?

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INTEREST OF AMICI CURIAE

This appeal raises important legal questions about how to apply the rule of reason to alleged anticompetitive conduct involving a "two-sided" platform—i.e., an intermediary that brings together two distinct groups of its customers to interact with each other. Amici States of New York, Alaska, California, Delaware, Hawai'i, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin, and the District of Columbia have a direct interest in ensuring that they may continue to effectively enforce antitrust laws to preserve vigorous competition in industries that may involve two-sided (or multisided) platforms.

The States have been increasingly active in enforcing the antitrust laws in sectors that may involve two-sided platforms, which have become more common with the rise of computer technology and the internet. For example, New York, Florida, Massachusetts, Ohio, Pennsylvania, and the District of Columbia entered into a settlement with the National Football League resolving antitrust claims arising from the NFL's policy of requiring all teams to impose a price floor on secondary tickets sold over NFL-sanctioned ticket-exchange websites—two-sided platforms that unite ticket buyers with ticket owners who want to resell their tickets.[1] And New York recently

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[1] N.Y. Att'y Gen., Press Release, A.G. Schneiderman Announces Multi-State Settlement with NFL Permanently Barring League-Wide Mandatory Ticket Price Floor (Nov. 15, 2016) (internet). (For sources available on the internet, URLs are listed in the table of authorities.)

entered into a settlement with Simon Property Group, the operator of an outlet center that connects retailers and shoppers, to prohibit Simon from using its contracts to restrict retailers from opening a nearby store—an anticompetitive restraint that thwarted the development of competing outlet stores.[2]

Amici States recognize that the economics of two-sided platforms may differ from the economics of traditional buyer-seller relationships, and that such economic differences should be properly taken into account in any application of traditional antitrust principles. But the court of appeals erred here in its approach to two-sided platforms, distorting bedrock antitrust law based on the mistaken belief that it was required to do so to account for the interdependent nature of the two sides of the platform at issue—a credit-card network that connects merchants and cardholders. First, the court of appeals erroneously defined the relevant market as the entire platform, combining into a single market the services Amex sells to merchants and the services Amex sells to cardholders—even though the well-established law on market definition would deem these two types of services to be in separate markets. Second, the court of appeals incorrectly required the government to demonstrate a net anticompetitive effect across the entire platform at the prima facie stage, rather than an anticompetitive effect (such as a price increase) on just one side of the platform.

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[2] N.Y. Att'y Gen., Press Release, A.G. Schneiderman Announces Settlement with Nation's Largest Mall Operator To Stop Anticompetitive Tactics at Woodbury Common Outlet Center (Aug. 21, 2017) (internet).

These holdings threaten to undermine amici States' antitrust enforcement efforts by placing an unwarranted burden on plaintiffs seeking to challenge unreasonable restraints in industries that may involve two-sided platforms, such as the credit-card industry. Contrary to the court of appeals' reasoning below, well-established antitrust doctrines involving market definition and burden shifting fully account for the distinct economics of two-sided platforms and the different ways in which firms operating two-sided (or multisided) platforms may compete. The amici States have a substantial interest in establishing the correct principles for analyzing unreasonable restraints of trade, in order to prevent disruption to their antitrust enforcement efforts.

STATEMENT

In this antitrust enforcement action, the United States and several States (together, the "government") alleged that respondents American Express Company and American Express Travel Related Services Company ("Amex") violated federal antitrust law by contractually barring merchants that accept Amex credit cards from encouraging their customers to use a different credit card that is less expensive for the merchants to accept. After a bench trial, the United States District Court for the Eastern District of New York (Garaufis, J.) held Amex liable for unreasonably restraining trade in violation of § 1 of the Sherman Act. On appeal, the United States Court of Appeals for the Second Circuit reversed and entered judgment for Amex.

A. Two-Sided Platforms

By connecting merchants and cardholders to complete financial transactions, Amex operates a business that economists call a "two-sided platform." *See* Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report* ("*Progress Report*"), 37 RAND J. of Econ. 645, 645-46 (2006).[3] Although many firms act as intermediaries between other businesses and customers, a distinct feature of two-sided platforms is that they connect two different groups of the firm's own customers and facilitate an interaction between them. *See* Delegation of the U.S. to the Competition Committee, *Roundtable on Two-Sided Markets: Note by the Delegation of the United States* ("U.S. Roundtable Note"), at 2, OECD No. DAF/COMP/WD(2009)68 (2009).

The manner in which the two sides of a platform interact may depend on the specific customer groups and businesses involved in each platform. But many two-sided platforms share certain common features. In particular, although the two groups of customers often purchase different products at different prices from the firm operating the platform, the value that each customer group derives from the platform may depend on the other group's usage of the platform. *See id.*; *see also Progress Report*, *supra*, at 645-67. With respect to credit-card platforms, for example, a credit card is more valuable to a retail customer when more merchants accept that card at their stores. In turn, a credit-card network is more valuable to merchants

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[3] *See also* Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. of Econ. Perspectives 125 (2009); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. of Econ. 669 (2006).

when more retail customers use that card to make purchases. *See* U.S. Roundtable Note, *supra*, at 2.

When the value that each customer group derives from a two-sided platform is interconnected in this manner, the company operating the platform may need to obtain and retain sufficient numbers of customers on each side of the platform to ensure that the platform functions effectively. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 990 (2003). For example, if too few merchants accept a credit-card company's card, consumers would likely have little incentive to use that card. And if hardly any consumers use a specific credit card, merchants would likely have little incentive to accept that card brand. To solve this problem, where one group of customers is more difficult to attract than the other group, the platform may structure its pricing to account for this difference. U.S. Roundtable Note, *supra*, at 2-3. For example, a shopping mall charges retailers rent to access the mall but likely allows shoppers to enter without charge. Credit-card companies have likewise long charged merchants higher prices for using credit-card services than are charged to cardholders, who may pay an annual card fee but usually pay no transaction fees and may even pay negative prices if they receive rewards from using a card. *See id.* at 3. Pricing thus may look "unusual in two-sided markets" because pricing on "one side of the market depends not only on the demand and costs that those consumers bring but also on how their participation affects participation" and pricing on the other side of the platform. Rysman, *supra*, at 129. Moreover, pricing is not the only competitive factor that may differ in two-sided markets because strategies for "innovation,

advertising, and quality investment can also take on added dimensions in a two-sided market." *Id.* at 135.

B. The Government's Antitrust Complaint Against Amex

In this case, the government alleges that Amex illegally stifled competition on the merchant side of its credit-card platform—also known as the "network-services market" or the "merchant-services market." The government challenged Amex's "anti-steering rules," which are private contractual provisions that bar merchants that accept Amex cards from encouraging their customers to use a different credit card. (Pet. App. 66a-68a.) Amex's anti-steering rules thus prohibit a merchant from indicating that it prefers another credit card or from offering consumers an incentive (such as a price discount) to use a different credit card. For example, the rules preclude a merchant from telling a customer that it "prefers Visa"; providing a discount to customers who use Discover cards; or posting a sign displaying the fees it pays to use each credit-card network. (Pet. App. 95a-96a, 100a.) Absent the anti-steering rules, a merchant might want to encourage its customers to use a non-Amex card brand because Amex often charges merchants higher fees than other credit-card companies charge. (Pet. App. 68a.)

The government alleged that the anti-steering rules caused actual anticompetitive effects in the merchant-services market by essentially eliminating the credit-card companies' incentives to compete for merchants. (*See* Pet. App. 68a.) For example, the government alleged that the anti-steering rules had raised merchant fees above competitive levels, prevented credit-card companies from offering lower

merchant fees, and stifled innovation. (*See* Pet. App. 196a-197a, 203a, 212a-214a.)

C. The District Court's Opinion

Amex's anti-steering rules are a form of restraint that is analyzed for antitrust purposes under the rule of reason. Courts follow a four-step burden-shifting framework to apply the rule of reason. First, the plaintiff has the initial burden to make a prima facie showing that the challenged restraint is anticompetitive in the relevant market.[4] *See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.* ("*NCAA*"), 468 U.S. 85, 104-13 (1984). Second, if the plaintiff carries its burden, the burden shifts to the defendant to establish a procompetitive justification for the restraint in the relevant market. *See id.* at 113; *California Dental Ass'n v. FTC*, 526 U.S. 756, 788 (1999) (Breyer, J. concurring in part & dissenting in part). Third, where the defendant satisfies its burden, the plaintiff may show that the defendant's procompetitive benefits could have been achieved through less restrictive means, i.e., actions that are less damaging to competition. Fourth, if no less-restrictive alternatives exist, the plaintiff bears the burden of demonstrating that the anticompetitive harms outweigh the procompetitive gains. *See* 7 Phillip E.

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[4] As an alternative to establishing directly that a restraint caused actual anticompetitive effects, a plaintiff may prove anticompetitive effects indirectly by establishing that the defendant imposed a restraint and possessed sufficient market power to impair competition. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 509 (2d Cir. 2004). This market-power route to establishing anticompetitive effects is not at issue here. See *infra* at 9 n.5.

Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 430 (3d ed. 2010) (describing framework's four steps). Applying this framework here, the district court determined after a seven-week bench trial that the anti-steering rules violate § 1 of the Sherman Act. (Pet. App. 66a-72a.)

Market Definition: The court first determined that the relevant market was the market for merchant "network services"—i.e., the services that enable merchants to process credit-card payments. The court rejected Amex's argument that the relevant market should be a market for credit-card "transactions," which would include not only merchant services but also the distinct services that Amex provides to cardholders—such as the provision of credit and cardholder rewards for using an Amex card. The court explained that merchant services and cardholder services are not interchangeable, and thus could not be collapsed into a single, platform-wide market under traditional antitrust doctrines. (Pet. App. 113a-121a.)

The court emphasized that limiting the relevant market to include only merchant services would not require the court to ignore entirely the cardholder side of the platform. Rather, the court explained that because the merchant and cardholder sides of the platform are "inextricably linked" (Pet. App. 118a), the court would consider "the two-sided features" of the platform as part of the rule of reason analysis (Pet. App. 121a).

Anticompetitive Effects: The district court next concluded that the government had satisfied its prima facie burden of showing that Amex's anti-steering rules had caused actual anticompetitive effects in the

market for merchant services.[5] Specifically, the court concluded that the rules had increased prices to merchants above competitive levels, blocked other firms from using a lower-fee business model, and stifled innovation. (Pet. App. 203a-214a.)

The court determined that the anti-steering rules caused these anticompetitive effects by exploiting interconnections between the merchant and cardholder sides of the network. As the court explained, the rules prohibited merchants from responding to increases in Amex's fees by encouraging customers to use lower-fee cards. (Pet. App. 194a-197a.) The rules did so by controlling merchants' interactions with customers at the "point of sale"—the critical moment when the merchant side and cardholder side of the platform meet to complete a credit-card transaction. (Pet. App. 195a.) At that moment, the merchant's decision to use a particular credit-card company's services—and thus to pay that company's per-transaction fee—is effectively controlled by the customer's decision to use a specific card. The court determined that prohibiting merchants from steering customers to use lower-fee cards deprived the merchants of "any meaningful ability" to switch their own use of network services in response to lower fees offered by a particular card network. (Pet. App. 196a.) As a result, the district court found that the anti-steering rules impeded horizontal competition among the credit-card networks because the networks lacked

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[5] In the alternative, the district court held that the government had satisfied its prima facie burden by demonstrating that Amex possessed sufficient market power to cause anticompetitive effects. (Pet. App. 148a-191a). This market power finding was reversed by the Second Circuit and is no longer at issue.

any incentive to offer merchants lower fees. (Pet. App. 194a-197a, 202a-203a.)

Procompetitive Effects: Because the government had established actual anticompetitive effects, the district court shifted the burden to Amex to demonstrate that its anti-steering rules had procompetitive effects in the merchant-services market. (Pet. App. 228a.) Among other arguments, Amex asserted two primary procompetitive justifications. First, Amex argued that the anti-steering rules allowed Amex to compete against other credit-card networks for *cardholders'* business. Amex contended that the anti-steering rules protected its ability to impose higher fees on merchants, and that those fees in turn funded robust cardholder rewards and other benefits that allowed Amex to compete with the larger credit-card networks (MasterCard and Visa) for cardholders. (*See* Pet. App. 229a-234a; Defs.' Post-Trial Br. ("Defs. Br.") 3-4, 21-25, *United States v. American Express Co.*, No. 10-cv-4496 (E.D.N.Y.), ECF No. 605; Defs.' Proposed Findings of Fact & Conclusions of Law ("Defs. Proposed Findings") 29-36, *American Express*, No. 10-cv-4496, ECF No. 612.)

Second, Amex asserted that the anti-steering rules allowed Amex to offer significant value, not only to cardholders, but also to merchants. Amex argued that its cardholder rewards program and other cardholder benefits allowed merchants to gain access to high-spending Amex customers. (*See* Defs. Proposed Findings, *supra*, at 36-40.) Amex further argued that, absent the anti-steering rules, merchants could free-ride on the benefits of Amex's investments in cardholder rewards while avoiding the higher merchant fees needed to fund those programs. (*See* Pet. App. 255a-256a; Defs. Br., *supra*, at 25-26.)

In analyzing both of these arguments, the district court questioned whether it could consider the anti-steering rules' purported procompetitive impacts on the market for cardholder services at all. The court noted that procompetitive effects in one market cannot be used to offset anticompetitive effects in a separate, interrelated market—here, the market for merchant services. (Pet. App. 238a-241a.)

The court nonetheless concluded that, even if such "cross-market balancing is appropriate" (Pet. App. 239a), the anti-steering rules were not reasonably necessary to achieve the procompetitive effects that Amex had raised (Pet. App. 239a-240a). The court found that Amex's business model was unlikely to collapse if the anti-steering rules were removed because merchants and cardholders would still want to use Amex's services if Amex truly delivered services superior to those of other credit-card networks. (Pet. App. 242a-245a.) The court also determined that the rules were not needed to prevent free-riding because rational cardholders would continue to use their Amex cards so long as the rewards offered by Amex were greater than any benefits provided by merchants for using a different card. (Pet. App. 257a.) The court concluded that even without the rules, Amex would thus continue to have an incentive to invest in its cardholder rewards program. (Pet. App. 257a.) Finally, the court determined that even if the anti-steering rules were necessary to achieve some procompetitive effects, any such procompetitive gains did not "offset, much less overcome," the rules' anticompetitive effects on the network-services market. (Pet. App. 229a; *see also* Pet. App. 239a-240a.)

D. The Second Circuit's Opinion

On appeal, the Second Circuit reversed and directed the district court to enter judgment in favor of Amex. (Pet. App. 4a.) Two holdings by the Second Circuit are relevant here.

First, the Second Circuit held that the district court had improperly defined the relevant market by excluding the customer side of Amex's two-sided platform. The Second Circuit determined that the proper market was the entire platform, including both cardholders and merchants (Pet. App. 50a), because concluding otherwise would improperly ignore "the two markets' interdependence" and the anti-steering rules' impacts on the cardholder side (Pet. App. 34a-35a.)

Second, the Second Circuit concluded that the government had failed to carry its prima facie burden of establishing that Amex's anti-steering rules caused actual anticompetitive effects in the platform-wide market it had defined. The court held that the government was required to prove a net anticompetitive harm across the entire platform—for example, by demonstrating that the anti-steering rules caused Amex to charge a supracompetitive "net price" to merchants and cardholders (Pet. App. 49a); reduced output by lowering the number of credit-card transactions; or reduced the net quality of services Amex provides to merchants and cardholders (Pet. App. 51a-52a).

The court determined that the government had failed to establish any such platform-wide net anticompetitive harm, and that the burden to prove procompetitive effects had thus never shifted to Amex. While the court did not question the district court's

finding that the anti-steering rules had increased prices *for merchants*, the court found that the government had failed to demonstrate a higher "net price" that took into account the benefits that Amex provided to cardholders. (Pet. App. 49a; *see* Pet. App. 53a.) The court thus faulted the district court for improperly focusing "on the interests of merchants while discounting the interests of cardholders." (Pet. App. 54a.) The court further reasoned that the government had failed to satisfy its prima facie burden, notwithstanding the price increase for merchants, because the overall number of credit-card transactions had increased rather than decreased, and because Amex had improved the quality of its cardholder services. (Pet. App. 52a-53a.)

SUMMARY OF ARGUMENT

Two-sided platforms present unique features that courts may appropriately consider in applying established antitrust doctrines. But the court of appeals here committed two critical legal errors in applying antitrust principles to Amex's two-sided credit-card platform. The court of appeals incorrectly concluded (1) that the relevant market must be defined as the entire platform, rather than as separate markets for merchant services and cardholder services; and (2) that at the prima facie stage, the government must establish a net anticompetitive effect that harms both merchants and cardholders, rather than an anticompetitive effect (such as a price increase) on only the merchant side of the platform.[6]

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[6] As explained *supra* at 7 n.4, as an alternative to direct proof of an actual anticompetitive effect, an antitrust plaintiff may

The Second Circuit distorted bedrock antitrust principles to reach both of these conclusions, based on the unfounded concern that it was required to do so to account for interdependencies between the merchant and cardholder sides of Amex's platform. But long-standing antitrust doctrines already ensure that courts may properly consider interdependencies between the two sides of a platform. The Second Circuit's novel and disruptive approaches to two-sided platforms are unnecessary and threaten to undermine valid antitrust enforcement.

I. This Court has long defined the relevant market for antitrust purposes as including only products that are reasonably interchangeable for each other. The court of appeals failed to apply this controlling principle here when it combined into a single market the services that Amex sells to merchants and the services Amex sells to cardholders. These two types of services are not interchangeable because a merchant that buys Amex's merchant services cannot switch to purchasing Amex's cardholder services in response to Amex increasing merchant fees.

The Second Circuit mistakenly defined the market as the entire platform based on the concern that separating the markets for merchant services and cardholder services would improperly ignore interconnections between these two sides of Amex's platform. But defining the relevant market as the market for merchant services would not preclude consideration of

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satisfy its prima facie burden by demonstrating that a defendant has imposed a restraint of trade and possesses sufficient market power to suppress competition in a properly defined market affected by the restraint. This independent route to establishing anticompetitive effects is not at issue here.

the anti-steering rules' impacts on the cardholder side of the platform, as the court of appeals reasoned. Rather, under a proper market definition, the court would be able to consider the anti-steering rules' impacts on the cardholder side to the extent that such impacts affect competition on the merchant side. Such an inquiry both accords with long-standing antitrust analysis and ensures that the competitive realities of a two-sided platform are fully addressed.

Defining the relevant market as including only merchant services also protects against another error in the Second Circuit's reasoning, namely, the suggestion that *any* benefit on one side of a platform will always be relevant to evaluating the reasonableness of a restraint on the other side of the platform—irrespective of whether the benefit actually affected competition on the side of the platform at issue. Such a blanket rule does not comport with the rule of reason's fact-intensive inquiry into a restraint's competitive effects in the *relevant* market. Because different industries may involve different types of two-sided (or multisided) platforms, the procompetitive significance of an out-of-market benefit on the relevant side of a platform will vary depending on the particular platform and restraint at issue. The antitrust inquiry should thus remain focused on whether, under the facts of each case, a procompetitive effect on one side of a platform affects competition in the relevant market on the other side of the platform.

II. The court of appeals' incorrect definition of the market as including both merchant and cardholder services caused the court to conclude that the government's prima facie burden to establish an anticompetitive effect required showing that the anti-steering rules imposed a *net* anticompetitive harm to

both merchants and cardholders. But the established burden-shifting framework applied under the rule of reason provides that where the government establishes an anticompetitive effect, the burden shifts to the *defendant* to show potential procompetitive effects from its restraint. The Second Circuit's "net harm" approach drastically distorts this framework by requiring the government, at the prima facie stage, to predict and disprove any potential procompetitive effects.

The burden-shifting framework was developed to avoid placing precisely such an undue burden on antitrust plaintiffs. Because a defendant possesses in-depth knowledge about its own industry and motivations for implementing a restraint, the burden should remain with the defendant to demonstrate procompetitive effects from its conduct. And contrary to the Second Circuit's concern, maintaining a proper allocation of burdens will not chill potentially procompetitive conduct in industries involving two-sided platforms. The burden-shifting framework already protects such conduct by providing a defendant with a full and fair opportunity to establish that its conduct causes procompetitive effects on the side of the platform at issue.

ARGUMENT

I. The Traditional "Reasonable Interchangeability" Rule for Market Definition Applies to Two-Sided Platforms.

A. The Services That Amex Sells to Merchants Are a Separate Market from the Services It Sells to Cardholders.

For more than fifty years, this Court, legal scholars, and economists have defined the relevant market for antitrust purposes as including only products that are reasonably interchangeable with the product over which the defendant is alleged to have exercised an illegal restraint of trade. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966); 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 235-38, 389-93 (4th ed. 2014). This "reasonable interchangeability" rule, *E.I. du Pont*, 351 U.S. at 404, properly identifies the range of products that consumers can buy from other firms instead of the defendant's product in response to defendant's conduct. The relevant market has long been defined in this way because reasonably interchangeable products constrain the defendant's ability to engage in anticompetitive conduct: purchasers will simply buy another product rather than continue to purchase the defendant's product subject to defendant's anticompetitive restraint. *See United States v. Microsoft*, 253 F.3d 34, 51-52 (D.C. Cir. 2001) (en banc) (per curiam); Areeda, Hovenkamp & Solow, *supra*, at 266-67.

Applying this bedrock principle of market definition here, the services that Amex sells to merchants and the services that Amex sells to cardholders are in separate antitrust markets because the two types of services are not interchangeable. As the petitioner States and the United States aptly explain, merchants that purchase Amex's merchant services cannot switch to buying Amex's cardholder services—such as the extension of credit and provision of rewards for using an Amex card—in response to Amex increasing its merchant fees. *See* Br. for the Pet'rs & Resp'ts Nebraska, Tennessee, and Texas 53-55; Br. for the United States 35-37. Likewise, a cardholder unhappy with an increase in the interest rate charged by Amex cannot switch to purchasing network services. Accordingly, merchant services "constitute a distinct market, separate from the market for" cardholder services. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003); *see also* Renata B. Hesse & Joshua H. Soven, *Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases*, 73 Antitrust L.J. 709, 726-27 (2006) (credit-card network may be able to exercise market power over only one side of two-sided platform).

B. Limiting the Relevant Market to One Side of a Platform Does Not Preclude Consideration of Impacts on the Other Side of the Platform.

The Second Circuit violated the well-established principles of market definition by collapsing the market for merchant services and the market for cardholder services into a single platform-wide market for credit-card transactions. The court applied this novel platform-wide approach based on a

concern that dividing the two sides of Amex's network into separate markets would improperly ignore interdependencies between the merchant and cardholder sides of the platform. (*See* Pet. App. 34a-35a, 39a-40a, 49a.)

The court's concern was unfounded. Separating the merchant and cardholder sides of Amex's network into distinct markets would not preclude *all* consideration of the anti-steering rules' competitive impacts on the cardholder side. To the contrary, courts applying the rule of reason may consider evidence about a restraint's impacts outside of the market in question when such impacts affect competition in the relevant market. Applying the traditional doctrine of market definition thus does not preclude the factual inquiry into cardholder benefits discussed by the court of appeals here. By contrast, the court of appeals' merger of the distinct merchant- and cardholder-services markets improperly constrains such a factual inquiry by mistakenly presuming that *any* cardholder benefit caused by Amex's anti-steering rules would be relevant to justifying the higher prices that those rules inflict on merchants—irrespective of the nature or strength of the interconnections between the two sides of the platform.

The appropriate way for this Court to resolve these competing concerns is to hold that (a) the relevant market is limited to merchant-side services, and (b) courts may look to the anti-steering rules' effects on the cardholder-services market, but only to the extent that cardholder benefits affect competition in the relevant market for merchant services. In this way, the market definition respects the "commercial realities" of two-sided platforms, *see Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992),

by permitting a factual inquiry into the related cardholder-services market, while limiting any such inquiry to only the relevant aspects of that separate market.

1. When the relevant market is one side of the platform, a court may consider the competitive effects on that market caused by a restraint's effects on the other side of the platform.

Allowing a court to consider arguments that an alleged restraint's impact on one side of a two-sided platform affects competition in the relevant market on the other side of the platform accords with established antitrust principles and long-standing practice. The touchstone of the rule of reason is the competitive effect of the challenged restraint and whether it suppresses or promotes competition. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."). This analysis has long encompassed consideration of a wide variety of factors—such as historical conditions, applicable regulations, and other "facts peculiar to the business"—that illuminate whether the defendant's conduct has anticompetitive or procompetitive effects in the relevant market. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). Competitive effects or legitimate justifications that arise in a separate but closely

interrelated market may likewise be considered, so long as they cause competitive effects in the *market at issue*.

Courts are familiar with considering the ways in which a defendant's conduct affects competition in the relevant market through interconnections between that market and a distinct but related market. For example, in *Microsoft Corp.*, several States and the United States proved at trial that Microsoft unlawfully maintained its monopoly in the market for Intel-compatible computer operating systems ("operating-system market") through, among other things, anticompetitive actions in the separate but inter-related market for internet browser software. *See* 253 F.3d at 47. In reaching this conclusion, the D.C. Circuit rejected Microsoft's argument that its actions in the browser market were irrelevant because there were separate markets for browsers and operating systems. *See id.* at 53-54, 78-79. Notwithstanding the separate markets, the court determined that inherent interconnections between these markets allowed Microsoft to maintain its monopoly in the operating-system market through actions it took in the browser market—specifically, Microsoft had suppressed usage of other companies' browsers and thereby prevented development of competing software applications that would have increased competition in the operating-system market. *Id.* at 60-62. Microsoft's browser-related conduct thus contributed to its anticompetitive monopolization of the operating-system market.

The parties in this proceeding presented similar evidence below about the feedback loop between the cardholder impacts of Amex's anti-steering rules and competition on the merchant market at issue here. For example, the government argued that the anti-steering

rules prevented consumers from obtaining (or even perceiving) any benefit from the lower-cost credit cards offered by Amex's competitors, and thus restrained price competition in the merchant-services market by eliminating any incentive for the credit-card networks to compete to offer lower merchant fees. (*See* Pls. Post-Trial Mem. 1, 5-7, 9, 11, 14-15, *American Express*, No. 10-cv-4496, ECF No. 606; *see also* Pet. App. 191a-198a.) Amex, in turn, argued that the anti-steering rules permitted it to offer robust benefits to cardholders that encouraged them to spend more money at the merchants' businesses—thus improving competition in the merchant-services market. (*See* Pet. App. 86a-88a; *see also* Defs. Br., *supra*, at 23-25; Defs. Proposed Findings, *supra*, at 226-33, 241-48.)

Adhering to traditional principles of market definition thus fully permits courts to consider whether a restraint's impact on one side of a platform causes actual and direct competitive effects in the relevant market on the other side of a platform. As the record shows, such evidence may both support and undermine a plaintiff's claim of an unreasonable restraint on competition in the relevant market. The court of appeals thus had no basis to reject traditional market-definition principles here.

2. Courts should not consider a restraint's asserted benefit on the other side of a platform unless it causes a procompetitive effect in the market at issue.

The Second Circuit's erroneous market definition led it to believe that *any* procompetitive benefit on the cardholder side could be considered in the competitive-effects analysis—irrespective of whether the benefit

had an effect on competition in the relevant merchant-services market. (*See* Pet. App. 51a (criticizing government for failing to consider anti-steering rules' effects on "*all* Amex consumers on both sides of the platform"); Pet. App. 54a (criticizing district court for "discounting the interests of cardholders").) Amex likewise argued below that its anti-steering rules could be justified solely by their alleged procompetitive effects on the cardholder side of the platform. See *supra* at 10.

Such reasoning expands too far the scope of potential procompetitive justifications relevant to analyzing a two-sided platform under the rule of reason. As this Court has explained, the rule of reason "does not open the field of antitrust inquiry to *any* argument in favor of a challenged restraint." *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 (emphasis added). In particular, a defendant may not simply point to some perceived benefit in a separate market to justify its anticompetitive actions in the market in question. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 330 (S.D.N.Y. 2001) (vigorous competition "to offer lower interests rates" and incentive programs to cardholders could not be used to offset "reduced price competition in the network services market"). Rather, the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions" in the relevant market. *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 688.

To be sure, two-sided platforms that exhibit close interconnections between the groups on either side of the platform would ordinarily aid a party's attempt to establish how impacts on one side of a platform affect competition on the other side. But because not all two-sided platforms are alike, the strength and importance

of "the network interactions between the two sides" of a platform will vary depending on the platform and market participants, as well as the specific restraint at issue. U.S. Roundtable Note, *supra*, at 3; *see* Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, 2005 Colum. Bus. L. Rev. 617, 630 (2005). Establishing the relevant connection is thus a fact-intensive inquiry that will turn on the particular features of the platform and restraint in question—features that are likely to differ from platform to platform and restraint to restraint.

For example, platforms that are used to complete financial transactions between two customer groups ("transactional platforms") differ significantly from other types of platforms. Transactional platforms—such as the credit-card payment platform at issue here—often exhibit strong, two-way interconnections between each side's use of the platform. *See* Lapo Filistrucchi, Damien Geradin & Eric van Damme, *Identifying Two-Sided Markets* 4 (Tilburg Univ., TILEC Discussion Paper No. 2012-008 2012) (internet).

In other cases, however, the interactions between the two sides of a platform "may be insignificant or may not be relevant for a particular antitrust issue" or a particular restraint. U.S. Roundtable Note, *supra*, at 3. For example, a newspaper is generally considered to be a two-sided platform that unites readers and advertisers. *See* Rysman, *supra*, at 128; *see Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). But a transaction between a reader and an advertiser does not occur each time that a reader purchases a newspaper or an advertiser buys advertising space. And while an advertiser likely wants to purchase more advertising from a newspaper that has

more readers, a reader does not necessarily want to purchase a newspaper because it has more advertisers—in fact, a reader might prefer a newspaper with fewer advertisers. *See* Filistrucchi et al., *supra*, at 4. As a result, although advertising revenue may allow the newspaper to charge a lower price to readers, the interdependencies between the two groups are more attenuated than in a transactional platform. *See id.* at 6-7.

An approach to two-sided platforms that too broadly allows a restraint's procompetitive effects on one side of the platform to justify its anticompetitive effects in the relevant market on the other side of the platform would improperly ignore such critical differences between platforms. Such an approach would also undermine proper enforcement in cases involving two-sided platforms or similarly complex industries. If the universe of relevant procompetitive factors is not limited to factors that are proven to have procompetitive effects in the relevant market, defendants could easily justify misconduct that stifles competition in one market by pointing to purported procompetitive effects in some other market—so long as they could plausibly claim that the two markets are connected in some way. Such an expansive view of the relevant procompetitive justifications would improperly allow defendants to "sacrifice competition" in one market "for greater competition" in another market, thereby frustrating the goals of the antitrust laws: to preserve vigorous competition in *all* markets. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610-11 (1972).

Nearly any two-sided platform could adopt Amex's expansive theory of procompetitive effects to justify even a naked restraint of trade on one side of the platform. For example, an outlet mall that prohibited

retailers from opening another outlet store within sixty miles could claim that it needs such a restraint to ensure that sufficient shoppers visit its outlet mall, thereby allowing the mall to compete with other outlets—even though the restraint plainly inhibits outlet malls' competition for retailers. This Court should not endorse such arguments, which, if accepted, would effectively allow a defendant to suppress competition in one market so long as it uses its supracompetitive profits to benefit a different group of customers in the process. *See id.* at 611-12 (explaining that defendants "keenly aware of their own interests" are not permitted to determine "relative values to society of competitive areas of the economy").

Moreover, adopting the Second Circuit's reasoning could have widespread negative consequences for antitrust enforcement in industries that involve interrelated markets other than two-sided platforms. Any firm in such an industry could try to justify its restraint's anticompetitive effects in the relevant market by pointing to purported procompetitive benefits from the restraint in a separate, interrelated market. Such arguments would likely become widespread because separate markets are often interconnected with each other. For example, the health care industry involves several separate but interrelated markets involving health care providers, insurance companies, and patients. But interconnections between the price of health care services and the price of health insurance does not mean that the medical services that hospitals sell to patients are in the same market as the insurance plans that insurance companies sell to insureds. And a hospital should not be able to justify a restraint that raises prices or decreases quality in the health care services

market by claiming, for example, that the restraint increases innovation in the insurance market. *Cf. United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720, 728-32 (W.D.N.C. 2017) (governments stated § 1 claim against hospital based on hospital's contractual provisions prohibiting insurance companies from encouraging patients to use lower-cost health care services). Allowing such wide-ranging effects to be cognizable would render unmanageable an already complex rule of reason analysis.

II. A Plaintiff Satisfies Its Prima Facie Burden by Demonstrating an Anticompetitive Effect—Such as a Price Increase—on One Side of a Two-Sided Platform.

The Second Circuit's erroneous definition of the relevant market as including both merchant services and cardholder services caused the court to conclude that the government's initial, prima facie burden to establish an anticompetitive effect required showing that the anti-steering rules imposed a "net harm" to competition for both merchants and cardholders. (Pet. App. 54a.) The Court should reject this approach and hold that the government satisfied its prima facie burden here by demonstrating that Amex's anti-steering rules stifle price competition in the market for merchant services.

A. A Plaintiff Should Not Be Required to Predict and Disprove All Possible Procompetitive Benefits to Satisfy Its Prima Facie Burden of Demonstrating an Anticompetitive Effect.

Through decades of experience, the courts have developed a burden-shifting framework to structure the highly complex and fact-intensive rule of reason inquiry. *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713, 756-57 (2014). Under this framework, when the plaintiff establishes that a restraint imposes an anticompetitive effect in the relevant market, the burden shifts to the defendant to establish a procompetitive effect from the restraint. *See NCAA*, 468 U.S. at 104-13; *California Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part & dissenting in part). When the defendant satisfies its burden, the plaintiffs may show that the procompetitive benefits could be achieved through less restrictive means. Finally, if the plaintiff fails to establish such less-restrictive options, the court determines whether the anticompetitive harms outweigh the procompetitive gains. *See* Areeda & Hovenkamp, *supra*, at 430.

This structured framework evolved to achieve a "fair and efficient" system for distinguishing between restraints that harm competition, which are prohibited, and restraints that promote competition, which are allowed. *See Leegin Creative Leather Prods.*, 551 U.S. at 898-99; *see also California Dental Ass'n*, 526 U.S. at 793-94 (Breyer, J., concurring in part & dissenting in part). The serial shifting of burdens strikes an important balance between the litigants. *See* Herbert Hovenkamp, *The Rule of Reason* 16 (Univ. of Penn. Law Sch. Inst. for Law and Econ., Research

Paper No. 17-28 2017) (internet) ("Of all the procedural issues involved in antitrust litigation under the rule of reason, none are more critical than questions about assignment of the burden of proof. . . . "). In particular, by giving plaintiffs the initial burden of showing only anticompetitive effects at the prima facie stage, and leaving to defendants the burden of identifying procompetitive justifications, the burden-shifting framework ensures that plaintiffs are not required to predict and refute "every possible fact or theory" that a defendant might assert to justify its conduct—a herculean standard that would render antitrust enforcement and litigations unfocused and unmanageable. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013); *see also* Hovenkamp, *Rule of Reason*, *supra*, at 34 (discussing *Actavis*).

Here, the government satisfied its initial burden at the prima facie stage by establishing that Amex's anti-steering rules had "the effect of raising the price" that merchants pay for credit-card services, *see NCAA*, 468 U.S. at 105, by eliminating any incentive for the credit-card networks to compete to offer lower fees to merchants. (*See* Pet. App. 195a-203a.) Such proof that the anti-steering rules actually "operated to raise prices" in the relevant market should have shifted to Amex the "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *See NCAA*, 468 U.S. at 113; *see also* Hovenkamp, *Rule of Reason*, *supra*, at 22 (discussing *NCAA*).

The court of appeals concluded otherwise, holding that the government had not satisfied its prima facie burden because it had not proven that the anti-steering caused a net anticompetitive effect on *both* merchants and cardholders. (*See* Pet. App. 51a-52a.)

The court appeared to give two reasons that the government's focus on supracompetitive prices for merchants was insufficient. First, the court reasoned that the government should further have calculated the "net" or "two-sided price" of credit-card transactions by offsetting "the value or cost of the rewards paid to cardholders" against the higher merchant fees that funded those rewards. (Pet. App. 53a.) Second, the court reasoned that the government should have shown that the anti-steering rules also reduced the overall volume of credit-card transactions or decreased the quality of credit-card services. (Pet. App. 52a.)

The court of appeals' "net harm" test misconstrues the government's prima facie burden. Both of the court's grounds for finding the government's initial showing defective required the government to prove more than anticompetitive effects in the relevant merchant-services market. But the additional showings that the court would have required are more appropriately seen as part of Amex's burden to prove procompetitive justifications. Under this Court's precedents, it was Amex's burden to demonstrate that its anti-steering rules led to increased cardholder benefits (to the extent that such benefits affect the merchant-services market, see *supra* Point I.B.2), or that the rules contributed to increased output or quality in the merchant-services market. *See NCAA*, 468 U.S. at 113. By requiring the government to *disprove* these procompetitive justifications at the outset, the court of appeals wrongly collapsed the first two steps of the burden-shifting inquiry into a single step.

Mandating that the government predict and disprove potential procompetitive effects simply to show an initial anticompetitive effect in the market

would severely undermine enforcement. The courts have placed the burden on defendants to establish that their conduct creates procompetitive effects because a defendant possesses in-depth knowledge about its own industry, business model, and motivations for imposing a restraint. *See* Areeda & Hovenkamp, *supra*, at 422-23; *see also California Dental Ass'n*, 526 U.S. at 792 (Breyer, J., concurring in part & dissenting in part) (explaining that defendants have incentive to introduce evidence of procompetitive justifications, if such evidence exists). By contrast, a government enforcer usually does not possess such information, and would thus be put in the untenable position of needing to speculate as to every possible rationalization that a defendant might assert for its conduct.

Indeed, this information gap between the litigants would pose particularly difficult hurdles for the government during early stages of litigation. If proving a "net anticompetitive effect" is required at the prima facie stage, as the Second Circuit held, then the government might need to plead such a "net effect" plausibly in its complaint simply to survive a motion to dismiss. *See* Hovenkamp, *Rule of Reason*, *supra*, at 17, 20. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (discussing minimum pleading standards). But the government often does not know prior to bringing suit whether a restraint might create procompetitive effects in the relevant market—let alone whether the restraint has procompetitive impacts on one side of a platform that redound to the benefit of the market at issue. By contrast, because the defendant is "in the best position to suggest the benefits that might flow from [its] activities," the plaintiff and court are entitled to presume that no

such benefits exist if the defendant cannot establish them. Areeda & Hovenkamp, *supra*, at 422.

Accepting the Second Circuit's novel rule would thus raise the risk of courts dismissing valid enforcement actions at the outset, even where the defendant's conduct imposes an obvious anticompetitive effect on one side of the platform. Such an approach could significantly harm competition in many sectors of the economy by shielding anticompetitive behavior by dominant firms in industries involving two-sided platforms.

B. Maintaining the Proper Assignment of Burdens Ensures That Potentially Procompetitive Conduct Is Not Chilled by Antitrust Enforcement Efforts.

The court of appeals required the government to disprove procompetitive effects at the prima facie stage based on the concern that, absent such a prima facie showing, antitrust lawsuits might chill genuinely procompetitive activities involving two-sided platforms. Specifically, the Second Circuit reasoned that ignoring interconnections between the two sides of a platform might prevent a firm from engaging in conduct that enhances output on both sides of a platform because of the fear that the firm's conduct could have an apparent anticompetitive effect (e.g., higher prices) on one side of the platform. (Pet. App. 35a (stating that focusing on competitive effects in only the merchant-services market would penalize legitimate competitive activities on the cardholder side "no matter how output-expanding such activities may be").)

The court of appeals' concern about protecting the incentives of firms to engage in procompetitive

activities is legitimate. But this concern is already fully addressed by the established burden-shifting framework. If a plaintiff establishes a prima facie case of anticompetitive harm based on effects on one side of a platform, the defendant has a full and fair opportunity to establish that its conduct creates procompetitive effects in the relevant market. Such procompetitive effects might include that its restraint enhances the platform's output—an effect that could benefit both sides of the platform. And if a defendant establishes a procompetitive effect in the relevant market, the parties may then attempt to show whether or not this procompetitive effect can be achieved through less restrictive means. See *supra* at 7-8. *See* Hovenkamp, *Rule of Reason*, *supra*, at 25. The established burden-shifting framework thus already protects against antitrust analysis too abbreviated to consider fully the competitive factors at play in a market. *See California Dental Ass'n*, 526 U.S. at 793-94 (Breyer, J., concurring in part & dissenting in part).

CONCLUSION

The decision and order of the court of appeals should be reversed and remanded for further proceedings.

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